BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the SUPREME COURT OF LOUISIANA is reported as No. 37,735 of the docket of said Court. The decision was handed down on the 26th day of March, 1945; a rehearing refused on the 30th day of April, 1945, and the complete opinion is embodied in the record in this case on pages 33 to 37.

II.

Jurisdiction.

1. The Supreme Court of the United States has supervisory jurisdiction to review by Writ of Certiorari a decision of a State Court of last resort or the Judgment and Decree of same and the Judgment and Decree of any Circuit Court of Appeals of the United States where the decision of the Court is in direct conflict with the FIFTH and FOURTEENTH AMENDMENTS of the United States Constitution and is in conflict with decisions of the United States Supreme Court itself, and/or decisions of the various Circuits of the United States Courts of Appeal.

2. The date of the Judgment to be reviewed is the 26th day of MARCH, 1945; and a rehearing which was refused in this case on APRIL 30th, 1945 (Record, p. 42).

III.

Statement of the Case.

Petitioner, Milton Shotts, was charged in a Bill of Information with violating Act 14 of the Second Extraordinary Session of the State Legislature of 1934 known as the LOUISIANA STATE NARCOTIC LAW, involving the possession of thirty-four (34) cigarettes, containing the dried form of the plant known as Marijuana (Record, p. 1).

This was the evidence upon which the prosecution was exclusively based and was obtained by certain agents of the Narcotic Bureau of the United States of America together with certain detectives of the New Orleans Police Department who went to the premises Petitioner lived in and located at No. 1105 St. Philip Street, this City, and more particularly the front room facing North Rampart Street, with an iron balcony attached, and which was leased and occupied by your Petitioner.

On August 21st, 1943, at or about nine o'clock these officers made ADMITTEDLY, a search of your petitioner's room without a Search Warrant and not as an incident to a lawful arrest or any arrest within the said premises and without any arrest of anyone being made prior to the search and without probable cause shown to have existed for the search. They found in the chifforobe of your petitioner, twenty-five cigarettes in the top drawer and eight cigarettes in the next drawer together with one cigarette in the pocket of a gray coat hanging in said

chifforobe, which thirty-four cigarettes they seized and used in evidence against him in the trial of this cause.

On September 27, 1944, the above petitioner was found "Guilty as Charged" by the Jury (Record, p. 2); on September 28, 1944, a Motion for a New Trial was filed on behalf of the petitioner and overruled by the Trial Judge (Record, p. 32), and also a Motion in Arrest of Judgment was filed and overruled by the Trial Judge (Record, p. 32). On the same date the Trial Judge, after the petitioner waived, through his Counsel, the usual delays for sentence, sentenced your petitioner to imprisonment in the State Penitentiary at hard labor for the period of twenty months (Record, p. 2). Your petitioner took an appeal to the Supreme Court of Louisiana, which Court affirmed the Judgment now complained of. This appeal was denied on March 26, 1945, and rehearing refused on April 30, 1945 (Record, p. 42). On the same date a Stay of Execution was filed and granted for a period of ninety days (Record, p. 42).

IV.

Specifications of Errors.

First: The trial Court is in error in holding that relevant evidence although seized without a search warrant, is nonetheless, admissible in evidence.

Second: The Court is in error in holding that the evidence in this cause which formed the basis of the charge and the prosecution should NOT have been excluded for

the reason that the search and seizure was admittedly made without a lawful warrant; was not made as an incident to an arrest prior to the search or an arrest within the premises and without any probable cause shown by the testimony of the State's witnesses to have existed for the search.

Third: That the Court is in error in holding that since the evidence in this cause was seized without a search warrant during a raid on petitioner's room when he was out of town it should NOT have been excluded for the reason that same was in direct contravention of SECTION 7 of Article I of the Constitution of Louisiana of 1921 and of the FOURTH, FIFTH and FOURTEENTH AMENDMENTS to the Constitution of the UNITED STATES OF AMERICA.

Fourth: That the Court is in error in allowing the State to offer, introduce and file in evidence the 34 cigarettes as it deprives him of his rights guaranteed him under Article I, Section 2 of the Constitution of the State of Louisiana and by the FOURTEENTH AMENDMENT of the Federal Constitution and that he was convicted, over his protest, without due process of law.

Fifth: That the COURT is in error in holding that evidence illegally seized and illegally obtained is admissible for the reason that a rule of evidence should NOT be allowed or permitted for any technical reason to prevail over constitutional rights.

V.

Summary of Argument.

Point "A".

The trial Court should have excluded from use against the petitioner the thirty-four cigarettes for the reason that the premises tenanted and particularly the room occupied by him was searched and ADMITTEDLY SO without lawful warrant, not incident to a lawful arrest within the said premises and room, and therefore unlawful; the evidence adduced conclusively shows that there was ample time and opportunity for the agents and detectives to have secured a search warrant, if probable cause existed therefor, and in the interim the premises and room and the actions of anyone could easily have been kept under surveillance; that the evidence in this proceeding had not been delivered to the clerk's office or the property clerk of the Criminal District Court for the Parish of Orleans; and that it was not proven beyond a reasonable doubt to the entire satisfaction of the Jury that the thirty-four cigarettes were a product of the plant known as the Marijuana Plant or technically as cannibis indica or cannibis sativa.

Point "B".

Evidence illegally seized and illegally obtained should not be allowed to be used in evidence against any person accused of a criminal offense for the reason that a rule of evidence should never be allowed for any technical reason to prevail over any of defendant's constitutional rights.

VI.

Argument.

It is respectfully contended that the foregoing and above outlined errors set forth under the heading "SPECIFICATIONS OF ERRORS" were serious errors in the trial of the petitioner and fatal to his rights. Attention is now invited to these "SPECIFICATIONS OF ERRORS."

Point One (I).

The Search of the Premises Tenanted by Your Defendant and Appellant and More Particularly the Room Occupied by Him Was Admittedly Made Without Lawful Warrant, Not Incident to a Lawful Arrest Within the Said Premises and Room, Therefore Unlawful.

We submit that the law is well settled that one's house, or place of business, can be searched without a lawful search warrant, only as an incident to a lawful arrest therein. This is well stated by the Court in *Papani v. United States (C. C. A. 9), 84 F. (2d), pages 160, 161, 162,* as follows:

> "The general rule is 'that one's house cannot lawfully be searched without a search warrant,' and the exception thereto is that one's house may be lawfully searched without a search warrant 'as an incident to a lawful arrest therein.'" *Agnello v. United States,* 269 U. S. 20, 32, 46 S. Ct. 4, 6, 70 L. Ed. 145, 51 A. L. R. 409. See also *Carroll v. United States,* 267 U. S. 132, 158, 45 S. Ct. 280,

287, 69 L. Ed. 543, 39 A. L. R. 790; *Marron v. United States*, 275 U. S. 192, 198, 48 S. Ct. 74, 72 L. Ed. 231; *United States v. Harry Frisch* (C. C. A. 5), 140 F. (2d) 660.

The two important elements of this exception to the general rule, which must be present in order to constitute the search a "reasonable" one, are (1) the arrest must be lawful; (2) the search must be incident to the arrest. As further stated by the Court in the above case, "the arrest merely serves the function of a search warrant."

In the instant case that the search was unreasonable, in the truest sense of the word cannot be denied and whatever violations were brought to light as the result of such unlawful search, justified neither the search nor the seizure, nor the use of the seized effects as evidence.

Taylor v. United States, 286 U. S. 1, 76 L. Ed. 951;
Walker v. United States, (C. C. A. 5) 125 F. 2d. 395;
Byers v. United States, 273 U. S. 28.

That since, admittedly, the search and seizure was made without a lawful warrant directing such a search and seizure and further as the search was not made an incident to arrest prior to the search or an arrest within the premises and without any probable cause having been shown by the testimony of the State's witnesses to have existed for the search, the said search and seizure is unlawful and the thirty-four cigarettes illegally seized should have been excluded as evidence against your petitioner and

the learned trial Judge was clearly in error in not excluding the evidence offered and introduced by the STATE against your petitioner.

Section 7 of Article 1 of the Constitution of the State of Louisiana of 1921 provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Amendment IV of the Constitution of the United States of America likewise provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The testimony of the State witnesses further showed that at the time the illegal search and seizure was made in the defendant's and appellant's room he was out of the City and when he returned and found out what occurred he repaired to the office of Mr. Howard S. Gossage, United States Narcotic Agent, and of his own free will and volition surrendered himself.

Point Two (II).

The Evidence Adduced Conclusively Shows That There Was Ample Time and Opportunity for the Agents and Detectives to Have Secured a Search Warrant, If Probable Cause Existed Therefor, and in the Interim, the Premises and Room and the Actions of Anyone Therein Could Easily Have Been Kept Under Surveilance.

The search herein was of a room facing the North Rampart Street side of the premises bearing the Municipal Number 1105 ST. PHILIP STREET. According to the testimony the agents and detectives went to the premises about nine o'clock P. M. on August 21, 1943, and further there was no evidence adduced or offered to show there was any necessity to proceed to these premises without applying for a Search Warrant, and a search without one, was for that reason, unreasonable. *Carroll v. United States, 267 U. S. 132, 69 L. Ed. 343.*

In the *Carroll* case, the Supreme Court distinguished between the search of permanent structures for which a warrant can be readily obtained, and the search of a ship, motor boat, wagon or automobile where it is not practicable to secure a warrant, as follows:

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search

of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

In the *Taylor* case, *286 U. S. 1, 76 L. Ed. 951*, the Court commented upon the facts, as follows:

"Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents made no effort to obtain a warrant for making a search. They had abundant opportunity to do so and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.". And the COURT concluded as follows: "We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed."

Where officers have information of a violation of law, and search a permanent structure, without a search warrant, the search is unreasonable.

Schroeder v. United States (C. C. A. 9), 14 F. (2d) 500;

In re Melbourne (C. C. A. 2), 77 F. (2d) 310;

Application of Rose, 32 F. Supp. 103; United States v. Kimber Radio, Etc., 8 F. Supp. 304.

In *United States v. Lefkowitz, 285 U. S. 452, 76 L. Ed. 877*, the Court said:

> "Indeed the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *United States v. Kirschenblatt* (C. A. A. 2), 51 A. L. R. 416, 16 F. (2d) 202, 203; *Go-Bart Importing Co. v. United States*, 282 U. S. 358, 75 L. Ed. 383, 51 S. Ct. 153.

We submit that to give officers, whether internal revenue agents, or others, blanket authority, to search premises suspected of having articles subject to tax would reinstate a condition against which the Fourth Amendment was adopted. This is well stated in *Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746*, as follows:

> "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the con-

temporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which Jeames Otis pronounced, 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child INDEPENDENCE was born.' "

Point Three (III).

That the Evidence in this Proceeding Had Not Been Delivered to the Clerk's Office or the Property Clerk of the Criminal District Court for the Parish of Orleans.

The testimony of the State witnesses, Mr. Howard S. Gossage, Mr. Leslie Hoyt and Mr. Amilcar J. Boudreaux, which was made part of Bill of Exceptions Number One, Number Two and Number Three, conclusively showed that from the date August 21, 1943, up to and in-

cluding the date of trial of this petitioner, which was September 27, 1944, the thirty-four cigarettes which were illegally seized from his room had never been delivered, to be retained as evidence in this proceeding against the accused, to the Office of the Clerk of the Criminal District Court for the Parish of Orleans or the Office of Property Clerk in accordance with the law with reference thereto.

Article 615 of Dart's Statutes;
Rule XX, Page 14 of the Rules of the Criminal District Court.

Point Four (IV).

That It Was Not Proven Beyond a Reasonable Doubt to the Entire Satisfaction of the Jury That the Thirty-four Cigarettes Were a Product of the Plant Known As the Marijuana Plant or Technically As Cannibis Indica or Cannibis Sativa.

The evidence in this proceeding did not conclusively show that the thirty-four cigarettes involved in this case were a product of the marijuana plant. There is no offer in evidence by the State of the written analization of the U. S. Chemist, Mr. Leslie Hoyt, made of these 34 cigarettes by him on or about August 24, 1943. Further, Mr. Hoyt testified that both the male and female species of the marijuana plant contained narcotic properties and he was flatly contradicted in his testimony by Dr. John M. Danneker, Chemist for the City of New Orleans, who specialized in the analization of the marijuana plant for over ten years and who testified that the male does not contain narcotic properties but only the FEMALE.

VII.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power in order that the jurisprudence of the United States of America on the important questions of law and procedure cited herein be UNIFORM.

Believing that petitioner, under the circumstances of this case, ought not to have been convicted; that the Judgments of the COURTS below were and are erroneous, petitioner respectfully submits his cause to this Honorable Court and respectfully prays that a WRIT OF CERTIORARI be granted him and that this HONORABLE COURT review the decision, opinion and decree of the SUPREME COURT OF LOUISIANA, and finally REVERSE IT.

Respectfully submitted,

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